**IN THE HIGH COURT OF JUDICATURE AT BOMBAY**

**ORDINARY ORIGINAL CIVIL JURISDICTION**

**WRIT PETITION NO. 2974 OF 2004**

Dominic Fernandes. ... Petitioner.

V/s.

Voltas Limited. ... Respondent.

Arshad Shaikh with Vinod Shetty for the petitioner.

C.U.Singh, senior counsel with Ankit Mehta i/b. Haresh Mehta & Co. for the respondent.

**CORAM: V.C.DAGA, J.**

**DATED: 3rd May 2007.**

**JUDGMENT :**
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. This petition is directed against the award and judgment dated 26th April, 2004 in Reference (IDA) No.932/1999 passed by the First Labour Court holding that the petitioner is not entitled to reinstatement with full back wages and continuity service with effect from 1st December, 1997.

**Brief Facts :**
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2. The brief facts of the case as borne out from the petition are that the petitioner- workman was

appointed on 22nd June, 1956 as ‘Mazdoor’ on temporary basis. At that time, while seeking temporary appointment, he had disclosed his date of birth as "1-1-1938". However, according to the petitioner, his correct date of birth is "1st January, 1939" and not 1st January, 1938. After completion of initial temporary service, the petitioner was again appointed from time to time on fixed temporary tenure basis till 10th April, 1962. According to the petitioner, in the temporary appointment letters dated 9th October, 1961 and 26th March, 1962, issued by the respondent-employer, his date of birth was shown as 1st January, 1939. According to him, he has taken education till 8th standard. In his perception, in the first approach to the employer, by mistake, he must have written his year of birth as 1938. But, thereafter, in the year 1961, he got it corrected as "1st January, 1939" by making representation. That is how, according to him, in all subsequent appointment letters dated 9th October, 1961; 23rd March, 1962 and 10th April, 1962 his date of birth came to be shown as "1-1-1939".

3. The petitioner’s further case is that sometime in the month of February, 1994, for the first time, he noticed from his Provident Fund Declaration and Nomination Form, that the initial entry of the year of his birth, which was shown as "1939", was cancelled

and substituted with that of "1938" by hand. The petitioner has, thereafter, sought correction with regard to the year of his birth in the record of the employer, by making representation to the respondent. According to him, even after 1994, the provident fund statements issued to him by the internal Trust of the respondent continued to show his birth date as 1st January, 1939. Thus, according to the petitioner, as per his date of birth, he ought to have been made to retire on 31st December, 1998, however, he was made to retire prematurely on 31st December, 1997.

4. The petitioner appears to have initially filed complaint under Item 9 of Schedule IV of the Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, 1971 (MRTU & PULP Act) being Complaint (ULP) No.1182/1997 in the Industrial Court, Mumbai. However, the said complaint came to be dismissed by the Industrial Court vide its order dated 30th March, 1998 holding it to be not tenable. However, during the pendency of the complaint, petitioner retired from service.

5. Being aggrieved by the aforesaid order, Writ Petition No.1304/1998 was filed in this Court.

Pursuant to the liberty granted by this court in the said writ petition, industrial dispute was allowed to be raised. The dispute, about date of birth, ultimately came to be referred to the First Labour Court, Mumbai. The reference made reads as under:

> "Shri Dominic Fernandes should be reinstated with full backwages and continuity of service w.e.f. 31.12.1997."

6. On being noticed, the respondent- employer appeared and resisted the claim of the petitioner by filing written statement. The respondent pleaded therein that at the time of recruitment of the petitioner, he himself, in his application form for employment, had disclosed his date of birth as "1-1-1938". According to the respondent, on the basis of his application for employment and declaration therein, the respondent had appointed the petitioner on first occasion by its letter dated 22nd June, 1956 as a temporary employee taking his date of birth as 1st January, 1938 and that the petitioner had repeatedly, right upto June 1961, declared, in his own hand, his date of birth as "1-1-1938" and accepted the terms and conditions of service as mentioned in four temporary appointment letters which, according to the respondent, formed part of the contract of employment

between the petitioner and the respondent- employer.

7. That the notice of retirement dated 1st July, 1997 was given to the petitioner on the basis of his own declaration made by him at the time of his initial appointment. That, according to the respondent, any declaration made subsequently by the petitioner either for the purposes of provident fund or E.S.I. benefits cannot form the basis of contract of employment because those declarations were made subsequent to the contract of employment without any documentary proof. Thus, according to the respondent, in reply to the correspondence made by the petitioner with the respondent, he, in categorical terms, was informed that as per his own declaration his date of birth is recorded as "1st January, 1938" and that he was being made to retire on the basis of his own declaration treating his date of birth as "1st January, 1938". According to the respondent, had the petitioner declared his date of birth as "1st January, 1939" he would not have been employed since he was below 18 years of age (minor). The respondent has denied that the petitioner had written any letter to it in August, 1961 enclosing the copy of Baptism certificate seeking change in his date of birth and that it was accepted

by the respondent resulting in change from "1st January, 1938" to "1st January, 1939".

8. With the aforesaid pleadings, issues were framed by the Labour Court. Parties were permitted to lead evidence in support of their rival contentions.

9. The petitioner had sought production of certain documents. The said prayer was opposed by the respondent. However, the learned Labour Judge vide his order dated 21st March, 2002 directed the respondent- employer to produce copies of Certified Standing Orders, appointment letter dated 9th October, 1961, Provident Fund Register declaration and nomination forms, original documents of Life Insurance Policy and appraisal reports from 1962 to 1997. It appears that appraisal reports for the years 1978 to 1980 and 1992 along with temporary appointment letters dated 22nd June, 1956; 7th March, 1961; 5th June 1961 and office copy of the letter dated 31st May, 1996 were produced. However, respondent did not produce documents, namely, appointment letter dated 9th October, 1961, Provident Fund declaration and nomination forms, original documents of Life Insurance Policy and appraisal reports from 1962 to 1977 and

1981 to 1991. An objection leading to non-production of documents as ordered by the Labour Court was raised by the petitioner- workman before the Labour Court.

10. With the aforesaid material on record, the Labour Court was pleased to hear the reference and disposed it of vide its award dated 24th June, 2004. According to the Labour Court, if the date of birth of the petitioner was "1st January, 1939" and while securing initial appointment the date of birth was disclosed as "1st January, 1938", then it must not be a clerical error or unintentional mistake because the first letter of appointment was issued to the petitioner on 22nd June, 1956. Had the employer known the date of birth of the petitioner as "1st January, 1939", then appointment could not have been given to the petitioner in the respondent company since he was minor on that date.

11. The Labour Court further held that if the petitioner had obtained appointment by mentioning wrong date of birth in his application form, then such act could not be said to be unintentional. Thus, the Labour Court was of the opinion that the petitioner having obtained service by concealing true fact as

regards his date of birth, the entries of date of birth made in the subsequent appointment orders or in Provident Fund Register reading as "1st January, 1939" in the absence of any order by the employer in the absence of any request letter by the petitioner on record and in absence of any order from the employer, it could not be said that the said entries were made after due verification and enquiry under the orders of the employer, as such the Labour Court came to the conclusion that the petitioner was not entitled to additional service of one more year. In the result, the reference came to be rejected by the Labour Court vide its order dated 26th April, 2004.

12. Being aggrieved by the aforesaid award of the Labour Court, the petitioner has invoked writ jurisdiction of this Court under Article 226 of the Constitution of India to challenge the legality and validity of the aforesaid award.

**Rival Submissions :**

13. At the outset, learned counsel for the petitioner submits that the finding of fact recorded by the Labour Court that the correct date of birth of the petitioner is 1st January, 1939 has not been

seriously disputed by the respondent in the present petition which was the main bone of defence before the Labour Court. He further submits that in spite of having come to the conclusion that the correct date of birth of the petitioner was 1st January, 1939 and the records of the respondent company after 1961 having shown date of birth of the petitioner as 1st January, 1939, the Labour Court could not have rejected reference made to it. In his submission, the Labour Court has committed an error of law in rejecting the claim of the petitioner on an *ex facie* erroneous premise that on 22nd June, 1956 the petitioner was not eligible for appointment in the company as he had not completed 18 years of age. According to him, in support of this finding, the Labour Court could not have relied upon the provisions of section 62(1A) read with section 2(a) of the Factories Act, 1948. In his submission, the Labour Court ought to have appreciated that at the time when the petitioner joined as temporary employee in the year 1956 or even when he became a permanent employee in the year 1962, section 62(1A) of the Factories Act was not on the statute book. The same was inserted in the Act by an amendment by Act 94 of 1976 and came into effect from 26th October, 1976. He, thus, submits that while

coming to such a conclusion, the Labour Court *ex facie* failed to take into consideration Chapter VII of the Factories Act which deals with the provisions relating to employment of young persons. According to him, had the Labour Court considered this Chapter, then it would have appreciated that an adolescent person, that is someone who had completed 15 years of age but has not completed his 18 years of age, was also entitled to the employment in a factory under the Factories Act. That the entire premise for disbelieving the petitioner is based on unsustainable and erroneous belief that persons below 18 years could not have been engaged in the employment in the year 1956. He, thus, submits that the impugned award is liable to be set aside on this ground alone.

14. The learned counsel for the petitioner further submits that the Labour Court also failed to appreciate that it was not the petitioner who had sought correction of date of birth at the fag end but the respondent, without following due process of law, had changed the date of birth of the petitioner at the fag end, which is not permissible, being against the settled principles of law. Learned counsel pointed out that the respondent has neither in its written

statement nor in the oral evidence came out with a case that the petitioner- workman would not have been appointed for want of having completed 18 years of age or that he deliberately suppressed his date of birth to obtain employment. That despite the order of the Labour Court the respondent failed to produce documents, of which the originals were in their possession and the Labour Court ought to have drawn an adverse inference against the respondent as they failed to produce the original documents relied upon by the petitioner.

15. The learned counsel for the petitioner further submits that when the petitioner was first employed, he was treated as temporary appointee for a period of six years i.e. 1956 to 1962. The appointment letters during this period state that the appointment was on a "purely temporary basis". He, however, submits that subsequent two more letters of temporary appointment dated 9th October, 1961 and 26th March, 1962 showed the correct date of birth of the petitioner. Therefore, according to him, the same cannot be a permanent contract of service. That at the time when the petitioner was given permanent employment, he was 23 years of age. According to him, the permanent

appointment letter would be the permanent contract of employment between the petitioner and the respondent. In the permanent appointment letter dated 10th April, 1962 the date of birth of the petitioner is mentioned as "1st January, 1939".

16. The learned counsel for the petitioner submits that the respondent cannot be allowed to rely on the appraisal forms of the petitioner wherein the dates were filled in by the respondent itself, and, as per their own admission in the evidence, these appraisal forms were confidential and never shown to the petitioner. He, therefore, urged that the impugned award is liable to be quashed and set aside with directions to the respondent to notionally reinstate the petitioner with full back wages, continuity of service and consequential reliefs including interest on the arrears of back wages.

17. Per contra, Mr.Singh, learned senior counsel appearing with Mr.Mehta for the respondent urged that at the time of recruitment of the petitioner along with other employees certain practices and procedures

were followed whereby the petitioner had to fill in the application form giving all the details with date of birth. The petitioner- workman had to give declaration that whatever information was filled in the application for employment was true to the best of his knowledge and belief. Accordingly, the petitioner had clearly disclosed and stated in his own handwriting; in his application seeking employment; his date of birth as 1st January, 1938. The application for employment, which was filled in by the petitioner, was accepted by the respondent and an appointment letter appointing him as temporary employee was given to him on 22nd June, 1956 mentioning his date of birth as "1st January, 1938". Mr.Singh, thus, submits that the said application form for employment is a service record of the petitioner and the appointment letter was issued to him formed a contract of employment between the petitioner- workman and the respondent- employer. The respondent had accepted the date of birth of the petitioner as 1st January, 1938, as such the said date of birth has to be treated as date of birth of the petitioner for all purposes including for the purpose of his superannuation.

18. Mr.Singh urged that this Court should take judicial notice of the fact that for getting employment in the company, a person needs to be 18 years of age. Employing a person below 18 years of age was and is strictly prohibited by law. Therefore, according to him the petitioner himself has made false statement in his application for employment by mentioning his date of birth as "1st January, 1938" to show that he was of 18 years of age at the time of his first appointment i.e. on 22nd June, 1956, which clearly shows that the petitioner had obtained employment on the false statement suppressing material facts, as such he is not entitled to claim any relief.

19. Mr.Singh submits that had the petitioner declared his correct date of birth i.e. 1st January, 1939 in his application in June 1956, he would not have got employment at that point of time because he was below 18 years of age. He submits that subsequently in the appointment letter dated 5th June, 1961 also the respondent had mentioned his date of birth as "1st January, 1938". He, thus, submits that it is well settled that if the workman obtains employment by suppression of material facts i.e. by suppression of his date of birth or by misleading true

and correct facts at the time of recruitment, then at the time of retirement he is not entitled to contend contrary.

20. Mr.Singh further submits that if the wrong date of birth was recorded, it was obligatory on the part of the petitioner to apply for getting it corrected. However, no such steps were taken by the petitioner- workman, as such there was no question of changing his date of birth by the responded- employer. He seriously disputed the assertion made by the petitioner that he had sought correction with regard to his date of birth in the month of August, 1961. That no such application was made is a finding of fact which cannot be disturbed in the writ jurisdiction.

21. Mr.Singh further submits that perusal of the evidence shows that Voltas Employees Provident Fund Trust is an independent and separate Trust registered under the Bombay Trust Act. The said Trust is run by the representatives of the employees and the management, which is independent and separate Trust in the eye of law. Therefore, in the submission of the respondent, any declaration given by the petitioner-workman to the said Trust has no relevance to decide

issue of date of birth of the workman. He further submits that even in appraisal reports produced on record, the date of birth is shown as "1st January, 1938".

22. Mr.Singh urged that the petitioner has taken advantage of employment of one year when, actually, he was not entitled to such employment and has derived advantages of one year service, as such the petitioner cannot be allowed to take further advantage of one more year of service. Thus, in his submission, the view taken by the Labour Court is legal and valid and cannot be said to be perverse warranting interference at the hands of this Court.

23. Mr.Singh further submits that while entering into contract of service, the petitioner himself has believed that his correct date of birth is 1st January, 1938. It is not a case that his date of birth was incorrectly recorded by the respondent-employer, as such, at this stage, the contentions sought to be raised by the petitioner- workman need not be entertained by this Court.

24. Mr.Singh, relying on the judgment of the Apex

Court in the case of **Burn Standard Co.Ltd. v. Dina Bandhu Majumdar**, (1995) 4 SCC 172, urged that the entry in the service record made on the basis of the employee's statement cannot be changed unilaterally at the sweet will of the employee except in the manner permitted by service conditions or the relevant rules. He further submits that while considering the prayer seeking to change the date of birth, the first thing which is required to be considered is whether on the date of entry into service, the employee would have been eligible for service on the revised date of birth. In his submission, if the answer is in negative, then change of date of birth or advantages therefrom are not permissible in the eye of law. He, thus, submits that the petition is liable to be dismissed holding it to be without any substance.

**The Issues :**

25. On the basis of the rival pleadings and the contentions referred to hereinabove, one has to determine the following issues in order to answer the reference made to the Labour Court in para-5 (supra):

(i) Whether the year of birth of the

petitioner on the material available on record is "1938" or "1939"?

(ii) Whether the view taken by the Court below is a reasonable and possible view?

**Consideration :**

26. Having noticed rival pleadings, submissions and the evidence available on record, the emerging undisputed facts are that at the time of seeking temporary employment the date of birth disclosed by the petitioner in the application was "1-1-1938". The initial three temporary appointment orders dated 22nd June, 1956; 7th March, 1961 and 5th June 1961 incorporate the date of birth of the petitioner as "1-1-1938", whereas the subsequent two orders of temporary appointment dated 9th October, 1961 and 26th March, 1962 incorporate date of birth as "1-1-1939". The petitioner was, subsequently, appointed on probation on the post of "Assembler" by an order dated 10th April, 1962; wherein the date of birth of the petitioner is mentioned as "1-1-1939". The date and month of the birth is not in dispute. The dispute is

only with regard to the year of birth.

27. The above factual matrix reveals that the period, during which the petitioner was employed on temporary basis, he was given as many as five appointment letters from time to time. The first three letters carried year of birth of the petitioner as "1938", whereas the subsequent two appointment letters carried year of birth as "1939" followed by an order of substantive appointment dated 10th April, 1962; carrying the year of birth as "1939". With the result, the date of birth viz. "1-1-1938" initially mentioned in the temporary appointment orders stood superseded and substituted with that of "1-1-1939". This change happened in the month of October, 1961 itself. The said date of birth came to be reiterated in all the subsequent appointment letters. In this view of the matter it was not open for the respondent to treat the date of birth of the petitioner as 1st January, 1938 relying on the application of the petitioner followed by three temporary appointment letters ignoring the subsequent appointment letters in which the date of birth viz. "1-1-1938" was superseded and substituted with that of "1-1-1939". All subsequent appointment letters carried date of

birth as "1-1-1939".

28. In the light of above undisputed factual documentary evidence on record, if one proceeds to consider further documentary evidence available on record in the form of "Family Declaration and Nomination Form" dated 24th February, 1994 submitted by the petitioner to the Voltas Limited Provident Fund, which carries the certificate and signature of one Mr.S.Y.Patil, Regional Personnel Manager (WZ); duly constituted authority of the respondent certifying the correctness of the facts stated therein, would unequivocally demonstrate that the year of birth originally mentioned therein was "1939". Subsequently, year "1939" has been scored and

substituted with that of "1938". The scored portion does not carry signature of anybody by way of attestation. Had the scoring or correction been made at the time of certification by Mr.Patil, it would have carried his signature or that of the petitioner. The custody of the said form was parted by the petitioner and the said form remained, initially, in the custody of the employer and then in custody of the Trustees who were no other persons other than

connected with the respondent- employer. It is, therefore, reasonable to infer that the correction in the year of birth of the petitioner may have been made behind the back of the petitioner without any notice to him.

29. The aforesaid factum when came to the notice of the petitioner, he moved in the matter and brought to the notice of the respondent- employer/management that the year of his birth is "1939" and not "1938" and prayed for restoration of his year of birth as "1939". Thus, it is not a case; wherein the petitioner was seeking to substitute his date of birth or year of birth for the first time in the year 1995. On the contrary, the petitioner was seeking restoration of his date of birth which was already reflected in the record of the respondent company as 1st January, 1939.

30. It is relevant to note that, in entire record of the Voltas Limited Provident Fund, the date of birth of the petitioner right from July 1965 has been shown as "1-1-1939". For the first time the change in the year of birth from "1939" to "1938" came to the light in the year 1995, thereafter petitioner moved in the matter. In this light of evidence again one has

to conclude that the entire record of the respondent-company right after October, 1961 and subsequent to the substantive appointment by letter dated 10th April, 1962 carried the year of birth as "1939" and not "1938".

31. The petitioner has produced Baptism certificate, school leaving certificate, certificate issued by the Municipal Corporation and the policy issued by the Life Insurance Corporation of India. All these documents carry date of birth of the petitioner as 1st January, 1939. The evidence in this behalf was led by the petitioner. The Labour Court on the basis of the appreciation of evidence recorded its finding reading as under:

> "..... It appears that the documents produced on record clearly show that the date of birth of the employee is 1.1.1939. The documents produced by the second party i.e. birth certificate issued by Brihanmumbai Mahanagarpalika, school leaving certificate,
>
> marriage certificate, Baptism Certificate clearly show that the date of birth of Dominic Fernandes is 1.1.1939. It appears from the application filled by the workman at the time of seeking employment, that the date of birth is mentioned as 1.1.1938. The said application is on record at Exh.C-6. It appears from the temporary appointment orders issued prior to 1960 or 1961 it show the date of birth of the workman or the employee as 1.1.1938 so far as the temporary orders issued thereafter show date of birth as 1.1.1939. The orders which are issued after year 1961 and the documents produced by the workmen

> pertaining to the Provident Fund Account show the date of birth as 1.1.1939. Considering these facts it can be said that the date of birth of the workman must be 1.1.1939 but at the time of seeking employment he filled an application by mentioning therein the date of birth as 1.1.1938."
>
> (Emphasis supplied)

32. The aforesaid findings are brushed aside by the Labour Court in the following words:

> "..... It appears that as per the record after the year 1961 the date of birth of workman was mentioned as 1.1.1939 in some of the appointment letters and in Provident Fund Account and other documents but there is no document produced on record to show that any such application or letter was sent by the workman to the Company for making; any change in his record as regards the date of birth. Therefore, in the absence of anything brought to the notice of employer if certain entries are made in the Provident Fund Account or in some other documents as regards the date of birth, it cannot be said that the Company has accepted his date of birth as 1.1.1939 unless it is shown that necessary order was passed by the Company for correcting the date of birth of the workman....."
>
> (Emphasis supplied)

33. The Labour Court went on to observe that considering the evidence available on record it can be said that the date of birth of workman must be 1st January, 1939 but brush aside the said finding saying that at the time of seeking employment the petitioner disclosed in the application form his date of birth as

"1-1-1938".

34. According to the Labour Court, the petitioner suppressed material facts from the respondent-employer. He made misrepresentation to secure employment as such the disclosure of date of birth "1-1-1938" was neither a clerical error nor an intentional mistake. The petitioner having taken advantage of deliberate misrepresentation by seeking employment during the period of his minority, he was not entitled to claim reinstatement with full back wages and continuity of service.

35. The aforesaid scenario, thus, makes it clear that even though the overwhelming evidence brought on record was rightly appreciated by the Labour Court with positive finding that the date of birth of the petitioner is 1st January, 1939, but the petitioner was non-suited on the singular ground that on the date on which he entered into the employment he had not completed 18 years of age and, therefore, he was not eligible for employment in the respondent- Company though this was not a plea raised in the written statement. In absence of plea in this behalf it was not necessary for the petitioner-employee to meet this

contention. At the same time, it was also not obligatory on the part of the Labour Court to record it's findings since other side had no notice of this contention. In this behalf, observations of the Supreme Court in case of **Shankar v. Britannia Biscuit Co. (A.I.R.1979 S.C.1652** relevant to the present case made in para 31 needs to be noticed.

> "...A contention to substantiate which evidence is necessary has to be pleaded. If there is no pleading raising a contention there is no question of substantiating such a non-existing contention by evidence. It is well settled that allegation which is not pleaded, even if there is evidence in support of it, cannot be examined because the other side has no notice of it and if entertained it would tentamount to granting an unfair advantage to the first mentioned party. We are not unmindful of the fact that pleadings before such bodies have not to be read strictly, but it is equally true that the pleadings must be such as to give sufficient notice to the other party of the case it is called upon to meet. This view expressed in Tin Printers (Pvt.) Ltd v. Industrial Tribunal (1967) 2 Lab LJ 677 at p. 680 (Punj), commends to us. The rules of fair play demand that where a party seeks to establish a contention which if proved would be sufficient to deny relief to the opposite side, such a contention has to be specifically pleaded and then proved. But if there is no pleading there is no question of proving something which is not pleaded. This is very elementary."

36. Needless to mention that inspite of legal

prohibition child employment is rampant in this country. But that by itself does not give right to the employer to deny them their legitimate claims. Consequently, the factors such as that of having taken advantage of concealment; misrepresentation; and incapacity to seek employment during the period of minority could not have been made grounds to reject the reference and non-suit the petitioner.

37. In the aforesaid backdrop, now the question is whether the view taken and conclusions drawn by the Labour Court on the basis of the material available on record could be said to be a reasonable and possible view or could it be branded as perverse conclusions.

38. The date of birth of the petitioner as 1st January, 1939 has not been seriously challenged by learned senior counsel appearing for the respondent in this petition. However, his contentions is that the basic application to seek employment resulting into contract of employment carried year of birth as "1939", hence the said year of birth alone can hold the field and it cannot be allowed to be changed at the fag end of the employment. In my considered view, this submission needs outright rejection and the

approach of the Labour Court in accepting this submission was absolutely perverse and untainable in the eye of law.

39. Firstly, the act of the petitioner during the period of minority can hardly be taken into account to non-suit his legitimate claim. There cannot be a valid contract with the minor. Secondly, the subsequent acceptance of the date of birth of the petitioner as 1st January, 1939 by the employer leads me to draw an inference that the respondent- employer has accepted the correct date of birth of the petitioner as 1st January, 1939. Had it not been so, in all subsequent appointment letters the said date would not have found place. In the last three letters of appointment the date of birth of the petitioner is mentioned as 1st January, 1939.

40. If the respondent is right in contending that the application for seeking employment carried date of birth as 1st January, 1938, then one has to ask a question: why the management did not maintain the same date of birth through out service career of the petitioner in his service record? Why was it allowed to be modified or changed from "1-1-1938" to

"1-1-1939"? To these questions there are no answers. The said date 1st January, 1939 is to be found in all the documents of provident fund and in all the certificates produced on record including that of policy of life insurance except in the application for employment followed by first three appointment letters referred to herein in para- 26 (supra).

41. At this juncture, it will be relevant to note that when the petitioner approached the respondent-employer for bringing it to its notice that his correct date of birth is 1st January, 1939 and tried to substantiate the same from the record of the respondent itself, he was informed that the contract of employment was drawn when he was employed on permanent basis from 10th April, 1962 and that his date of birth was correctly recorded as 1st January, 1938 in the record of the company, as such the change cannot be accepted. Taking the very same reply to its logical conclusion, the finding recorded by the Labour Court cannot be sustained.

42. At the cost of repetition it must be mentioned that in the letter of the respondent- employer dated 5th December, 1995, whereby the request of the

petitioner for correction of record was rejected, a specific reference made to the contract of employment drawn; when the petitioner was employed on permanent basis by appointment letter dated 10th April, 1962. If the said letter dated 10th April, 1962 is the contract, then it carries date of birth as "1-1-1939". Therefore, the respondent- employer on its own contention could not have rejected the prayer of the petitioner for correction of record so as to restore "1939" as his year of birth.

43. It will also be relevant to note that during the course of trial before the Labour Court, production of documents was sought by the petitioner. The prayer for production was opposed by the respondent- employer. In spite of strong opposition the Labour Court vide its order dated 21st March, 2002 directed the employer to produce documents sought by the petitioner. All the documents sought by the petitioner were not produced. Consequently, the petitioner was again required to file an objection bringing it to the notice of the court the factum of non-production of documents and prayed for drawing an adverse inference against the employer. The Labour Court ignored this important aspect of the matter and

failed to draw adverse inference against the respondent- employer for non-production of the documents in spite of its order. The most important documentary evidence, production of which was sought by the petitioner through his application was not produced. The irresistible inference that those documents which were not produced would have supported the case of the petitioner and not of the respondent-employer, ought to have been drawn by the Labour Court, following the law laid down by the Supreme Court in the case of **K.M. Patel vs.Firm, Mohamadhussain Rahimbux (A.I.R. 1981 Supreme Court 977)** (para 10) reading as under:

> "....The non-production of those books by the defendant firm and the production by it of stray letters and a bill constitute failure on its part to produce the best evidence and a presumption has therefore to be raised against it that if such evidence had been produced, the same would have gone against the case propounded by it."

44. In the aforesaid backdrop, one has to conclude that this is not a case wherein the petitioner-employee was raising dispute for the first time at the fag end of his career and was seeking any correction in his date of birth. As a matter of fact, he was seeking recognition of his date of birth which was already available in the record with the employer.

The entire record of the respondent- Company, right from October, 1961 onwards, was carrying his date of birth as 1st January, 1939 corroborated by the documents of the Voltas Limited Provident Fund with other documents. For the first time the year of birth from "1939" to "1938" was changed after the year 1994, that too, behind the back of the petitioner and since then alone the respondent-employer started insisting on his date of birth as 1st January, 1938. In this view of the matter, the judgments of the Apex Court sought to be relied upon by the learned senior counsel for the respondent in the case of **Hindustan Lever Ltd. v. S.M.Jadhav**, (2001) 4 SCC 52 and **Union of India v. C.Rama Swamy**, (1997) 4 SCC 647 can hardly be said to be of any assistance to the respondent.

45. The learned counsel for the petitioner has rightly relied upon the judgment delivered by this Court in the case of **Tata Memorial Centre v. Tata Memorial Hospital Kamgar Sanghatana**, 2006 (4) Mh.L.J. 461; wherein the issue was whether unilateral change of date of birth of the employee in the recorded of the employer was in accordance with law. While considering the said issue, this court relying upon the judgment of the Apex Court in the case of **State of**

**Orissa v. Dr.(Miss) Binapani Devi**, 1967 (II) LLJ 266 ruled that without giving prior notice or opportunity of hearing to the workman, his date of birth cannot be altered to his disadvantage or prejudice because it is an administrative order which entails civil consequences. Any adverse change or action is required to be made in conformity with the rules of natural justice, which at its lowest minimum mandates prior notice and opportunity of hearing to the person affected thereby.

46. I am also supported by another judgment of the learned single Judge of this Court in the case of **Rajya Sahakari Krushi v. Maharashtra State Co-op. Agri. and Rural Dev.Bank Ltd.**, 1996 (I) CLR 54; wherein the employer had unilaterally made alteration in the date of birth of its workman in her service record. It was objected by her; contending that unilateral decision by the bank in making such alteration without notice to her was in breach of principles of natural justice. This submission made on her behalf found favour with this Court while considering the petition; wherein rejection of interim relief was challenged by the workman.

47. While considering the application for correction of date of birth the applicant has to produce evidence in support of such claim in the nature of irrevocable proof relating to his date of birth. Whenever any such question arises the onus is on the applicant to prove the wrong recording of his date of birth in his service record. Unless a clear case, on the basis of conclusive material is made out, correction is not to be ordered. Such claim must be operated by prima facie evidence of an impeachable character and must be based on material which can be held to be conclusive in nature as held by Supreme Court in **Secrtetary & Commissioner, Home Department v. R. Kirubakaran, A.I.R. 1993 SC 2647**.

48. Considered on the above back drop, impeachable evidence is on record to establish the claim of the petitioner. As a matter of fact, positive finding is recorded by the Labour Court in favour of the petitioner but the relief was denied on the perverse consideration as indicated in para (35) supra. Considered from different angle, it is not in dispute that two different dates of birth of the petitioner were on the record of the respondent- employer. Both were recognised by the respondent for two different

periods. If that be so, it was obligatory on the part of the respondent to objectively determine; out of two dates or two years of birth which one was correct on the basis of material available, following principles of natural justice. However, respondent-employer failed to discharge this obligation and erroneously, with closed mind, sought to rely on the letter of substantive appointment dated 10th April, 1962. The same error has been committed by the Labour Court. It was obligatory on the part of the Labour Court to determine out of two dates which was a correct date of birth. But the Labour Court failed to approach the issue in its proper perspective. Thus, the findings recorded by the Labour Court that there was no document seeking correction of date of birth and that there was no order of the employer accepting "1st January, 1939" as correct date of birth are absolutely perverse. This is not a case; wherein the employee was seeking substitution of his date of birth. He was seeking restoration and recognition of his date of birth which at one point of time was holding the field in supersession of his originally declared date of birth. Considered from this angle, unimpeachable evidence is on record conclusively prove that the date of birth of the petitioner was "1939"

and not "1938".

49. Having said so, the impugned order is unsustainable being perverse and liable to be quashed and set aside.

50. Now, I have reached the stage of granting proper relief to the petitioner in the light of my findings recorded hereinabove. Once it is held that the action of the respondent- employer is not legal and valid and the impugned order is liable to be quashed and set aside, the logical consequence would be that the petitioner- workman would be entitled to reinstatement with continuity of service and, in normal course with full back wages. However, since the petitioner has crossed age of superannuation even on the basis of his correct date of birth, i.e. 1st January, 1939, the question of reinstatement at this stage is out of question.

51. Now, the question is, whether the petitioner would be entitled to full back wages for the intervening period of one year. However, in my view, in peculiar facts and circumstances of the case, it would not be proper to grant full back wages for the

aforesaid period of one year to the petitioner. Firstly, because the litigation itself consumed a period of more than 10 years. Secondly, it is difficult to comprehend that during this period of one year the petitioner would remain idle or without work, especially, with openings of huge job opportunities. At the same time, the respondent- employer did not get advantage of his services, may be because of its own decision but the fact remains that the employer was deprived of his services. Under these circumstances, the petitioner shall be entitled for arrears of salary for a period of one year from 1st January, 1998 to 31st December, 1998 computed on the basis of 50% of back wages. He shall also be entitled to re-fixation of pensionary benefits, if available under service conditions or rules governing his employment. The arrears of salary calculated on the basis of 50% back wages should be paid to the petitioner within a reasonable period not exceeding three months from today, failing which the arrears shall carry interest at the rate of 10% per annum after the expiry of three months period till it is paid in full and final.

52. In the result, petition is allowed. Impugned order is quashed and set aside. Rule is made absolute

in terms of this order with costs quantified in the sum of Rs.5,000/-.

**(V.C.DAGA, J.)**